

MEMORANDUM

TO: Mayor Peggy Wheeler
Vice Mayor John Callaghan
Members of the Town Council

FROM: Leonard G. Rubin, Town Attorney 

RE: Senate Bill 180 and its Impact on Appearance Review/Harmony Standards for Single-Family Dwellings

DATE: July 21, 2025

CC: Robert Cole, Town Manager
Frank Davila, Planning and Zoning Director
Caitlin Copeland-Rodriguez, Town Clerk

BACKGROUND:

Town Council's Direction

At its May 28, 2025, meeting, the Town Council directed Staff to proceed with the following revisions to the Town's Zoning Code as a means of continuing the enforcement of harmony review for single-family dwellings and complying with the state law preemption of the regulation of building design elements:

1. Amend the Zoning Code to remove architectural review of single-family and two-family dwellings from the Appearance Review Criteria;
2. Create a Zoning in Progress to provide Staff with ample time to update the Code as necessary, thereby pausing applications for Appearance Review under the existing Code provisions;
3. Amending the Zoning Code to remove Appearance Review for single-family dwellings;
4. Amend the Zoning Code to revert the review of single-family dwellings from the Planning and Zoning Board back to Town Planning and Zoning Staff;
5. Amend the Zoning Code to revise the comparison of harmony language among buildings from "the preponderance of buildings or structures within 300 feet from the proposed site in the same zoning district" to "the buildings or structures within the same contiguous zoning district;" and
6. Amend the Zoning Code to implement the following additional tools/regulations to

the building site area regulations for each single-family zoning district to promote harmony through base zoning:

- a. Require an additional five-foot setback for second stories for all yards;
- b. Require a second-story Floor Area Limit (“FAL”) of seventy-five percent (75%) of the floor area of the first story;
- c. Increase the percentage of minimum landscaped open space; and
- d. Implement a design/pattern book highlighting the Town’s desired architectural styles and explore the possibility of providing incentives to encourage use of the desired styles.

Senate Bill 180

While Town Staff was in the process of implementing the Town Council’s direction, on June 26, 2025, the Governor signed Senate Bill 180 into law as Chapter 2025-190, Laws of Florida. Senate Bill 180 imposes a multitude of additional requirements on local governments relating to emergencies. Most importantly, however, Section 28 of Senate Bill 180 drastically limits the Town’s ability to revise its Zoning Code. Specifically, because Palm Beach County is listed in the Federal Disaster Declaration for Hurricane Milton, prior to October 1, 2027, the Town may **not**:

1. Propose or adopt any moratorium¹ on construction, reconstruction, or redevelopment of any property damaged by such hurricane;
2. Propose or adopt more restrictive or burdensome amendments to its comprehensive plan or land development regulations; or
3. Propose or adopt more restrictive or burdensome procedures concerning review, approval, or issuance of a site plan, development permit, or development order.

Any such moratorium or more restrictive or burdensome comprehensive plan amendments, land development regulations, or procedures shall be “null and void ab initio.” These restrictions apply retroactively to August 1, 2024.

Senate Bill 180 further authorizes a resident or business owner in a municipality to bring a civil action for declaratory and injunctive relief against the municipality for violating the foregoing prohibitions. Once the action is filed, the resident or business owner is entitled to a preliminary injunction against the municipality preventing the implementation of the moratorium or the comprehensive plan amendment, land development regulation, or procedure. If such a civil action is successful, the resident or business owner is entitled to an award of reasonable attorney fees and costs. Attorney fees and costs may **not** be

¹ The Town’s current moratorium is not impacted by Senate Bill 180 because it only applies to new applications for development approval of a commercial, mixed-use, or multi-family residential project and would not impact property damaged by a hurricane.

awarded if: (i) the resident or business owner provides the governing body written notice that the moratorium, comprehensive plan amendment, land development regulation, or procedure is in violation of Section 28 of Senate Bill 180; and (ii) the governing body withdraws the proposed moratorium, comprehensive plan amendment, land development regulation, or procedure within fourteen (14) days or, in the case of an adopted moratorium, comprehensive plan amendment, land development regulation, or procedure, the governing body “notices an intent to repeal within fourteen (14) days of receipt of the notice, and repeals the moratorium, comprehensive plan amendment, land development regulation, or procedure within fourteen (14) days thereafter.”

Impact of Senate Bill 180 on Town Council’s Direction

As set forth above, Senate Bill 180 prevents the Town from adopting any amendments to its Zoning Code that impose a greater burden on residents or business owners or are more restrictive or limiting. On their face, the following proposed revisions to the Zoning Code addressing harmony for single-family dwellings through base zoning are more restrictive or burdensome and would likely subject the Town to a civil action for declaratory and injunctive relief (and the potential for payment of both its own attorney’s fees and costs and the attorney’s fees and costs incurred by the resident or business owner):

- increasing the yard setbacks for the second story;
- imposing a second-story Floor Area Limitation; and
- increasing the minimum landscaped open space.

The expansion of the comparison area for harmony is not necessarily more burdensome or restrictive because the comparison of all buildings and structures within the same contiguous zoning district (as opposed to the preponderance of those located within 300 feet) may, dependent upon the circumstances, work to the benefit of the resident or business owner and allow a *larger* structure. By way of example, utilizing the three newly constructed single-family homes on U.S. Highway One as comparators may allow larger homes to be constructed on both Appollo Drive and Diana Lane because they are located within the same contiguous (RS-1) zoning district. In fact, these dwellings were cited by the Planning and Zoning Board when approving the appearance review application for 401 Diana Lane, notwithstanding that they are not located within 300 feet of that particular property.

Senate Bill 180 does not, however, prevent the Town from moving forward with other Zoning Code revisions as directed by the Council, namely:

- removing architectural review for single-family and two-family dwellings;
- removing appearance review for single-family dwellings; and
- reverting to Staff review and approval/denial of appearance review for single-family dwellings.

The Zoning in Progress is still in place until the Town Council affirmatively votes to lift it; however, as explained above, given the preemptions set forth in Senate Bill 180, various components of the direction provided to Staff in May, particularly those aimed addressing harmony for single-family dwellings through base zoning, are no longer viable or available to the Town without the risk of being sued.

Town's Existing Appearance Review Regulations

The Town's current regulations governing appearance review of single-family dwellings were adopted prior to August 1, 2024, and therefore are **not** impacted by Senate Bill 180. The Town Code currently requires appearance review by the Planning and Zoning Board for single-family dwellings. The Code contains the following applicable appearance review criteria as set forth in Section 34-116 of the Town Code:

1. Is of a design and proportion which enhances and is in harmony with the area. The concept of harmony shall not imply that buildings must look alike or be of the same style. Harmony can be achieved through the proper consideration of setback, scale, mass, bulk, proportion, overall height, orientation, site planning, landscaping, materials, and architectural components including but limited to porches, roof types, fenestration, entrances, and stylistic expression. For the purposes of this section, the comparison of harmony between buildings shall consider the preponderance of buildings and structures within 300 feet from the proposed site within the same zoning district;
2. Elevator and stairwell shafts and other modern operations and features of a building shall be either completely concealed or shall incorporate the elements of the architectural style of the structure; rooftop equipment and elevator and mechanical penthouse protrusions shall be concealed; and parking garages and other accessory structures shall be designed with architectural features and treatments so that they are well proportioned and balanced and in keeping with the architectural style of the principal structure;
3. Shall have all on-site structures and accessory features (such as but not limited to light fixtures, benches, litter containers, including recycling bins, traffic and other signs, letter boxes, and bike racks) compatible in design, materials, and color;
4. Shall have a design in which buildings over 40 feet in height shall appear more horizontal or nondirectional in proportion rather than vertical, accomplished by the use of architectural treatments as described in these criteria;
5. Shall locate and design mechanical equipment with architectural treatments so that any noise or other negative impact is minimized;
6. Complies with the town's community appearance standards (see article IV, division 14 of this chapter).

When determining whether a proposed dwelling “is of a design and proportion which enhances and is in harmony with the area,” the Zoning Code defines both “harmony” as well as certain terms contained within the definition of harmony:

- *Harmony* means a quality which produces an aesthetically pleasing whole as in an arrangement of varied architectural and landscape elements. Harmony can be achieved through the proper consideration of scale, mass, bulk, proportion, height, orientation, site planning, landscaping, materials and architectural components, including, but not limited to, porches, roof types, fenestration, entrances and stylistic expression.
- *Bulk* means the overall size and volume of a building or structure.
- *Mass* means the relationship and sizes between different volumes of a building or structure.
- *Proportion* means the visual effect of relationship of one portion to another, or of a portion to the whole, or of one thing to another.
- *Scale* means the proportions of a building in relation to its surroundings, particularly other buildings in the surrounding context.

As fully explained at the Town Council's May 2, 2025, workshop meeting, in applying these criteria, Town Staff has utilized various tests or metrics for assessing both the bulk and mass of proposed single-family dwellings and evaluating their scale. Staff developed these metrics to ensure consistent application of the subjective criteria and to satisfy requests from the Planning and Zoning Board for measurable, objective standards. These tests or metrics are not codified; rather, they were developed to provide transparency to applicants and members of the public regarding Staff's analysis of appearance review applications.

QUESTION PRESENTED:

Given the preemptive language of Senate Bill 180, what are the Town's options moving forward as they relate to appearance/harmony review for single-family dwellings?

SHORT ANSWER:

The preemptive language of Senate Bill 180 prevents the Town from proceeding with the direction provided to Town Staff at its May 28, 2025, Town Council meeting. Consequently, the Town Council's options are: (1) to continue with the direction provided in May to the extent not preempted by Senate Bill 180 and revert to base zoning for single-family dwellings; or (2) to continue to conduct appearance/harmony review consistent with the Zoning Code regulations currently in effect. If the Town Council chooses the latter option, it should create a Design or Appearance Review Board, consisting of persons trained in the fields of architecture, planning, real estate, and similar fields, to perform such review and authorize appeal of the Board's decisions to the Town Council.

ANALYSIS:

1. Continue with the direction provided in May to the extent not preempted by Senate Bill 180 and revert to base zoning:

As discussed above, the Town Council can choose to move forward with the portions of the direction provided to Staff that are not preempted by Senate Bill 180. This would involve removing architectural review, removing appearance review, and reverting approval of single-family dwellings back to Town Staff. Because Staff is precluded from amending the base Zoning Code to address “harmony” through modified site area regulations (increasing the second-story setback, imposing a FAL for the second-story, and increasing the minimum landscaped open space), this would essentially revert the review of single-family dwellings back to the current base zoning regulations. However, the Town Council could still move forward with the pattern book (either with or without incentives) and encourage specific architectural designs and styles.

This course of action would allow residents to add second-stories and otherwise expand the square footage of existing single-family dwellings pursuant to the existing site area regulations. It would also eliminate the possibility of lawsuits arising out of appearance review decisions, including any claims for monetary damages pursuant to the Bert J. Harris Act. Because there would no harmony review for single-family dwellings, the potential negative would be larger, boxier single-family dwellings, especially by those seeking to purchase lots within the Town with the intent to construct new single-family dwellings, “flip” the properties, and maximize their investment.

2. Continue to conduct appearance review consistent with the regulations currently in effect

As explained above, the Town’s current regulations governing appearance review for single-family dwellings are not impacted by Senate Bill 180. However, various stakeholders within the Town have raised concerns regarding the continued enforcement of the existing regulations. These concerns include, but are by no means limited to, Staff’s use of uncodified tests or metrics, the unpredictable nature of the inherently subjective regulations, the reluctance of the Planning and Zoning Board to enforce non-quantifiable standards, and the potential for inconsistent application of such regulations moving forward. Such concerns warrant an analysis of the validity of such regulations and the potential for future legal challenges.

a. Validity of the Town’s existing regulations:

In Florida, municipal zoning ordinances are presumed valid and constitutional and must be upheld if it can be shown that they bear a “rational relationship to a legitimate public purpose.” *Kuvin v. City of Coral Gables*, 62 So. 3d 625 (3d DCA 2010), *rev. denied*, 64 So. 3d 118 (Fla. 2011). In other words, “zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies, or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality’s police power.” *Id.* at 632. Florida courts “have repeatedly found that measures designed to enhance or

maintain the aesthetic appeal of a community are a valid exercise of a local government's police power and these measures bear a rational relationship to a legitimate purpose." *Id.* at 633. Florida has long recognized that local governments may legislate to protect the appearance of their communities as a legitimate exercise of their inherent police power. *Id.* at 634 (quoting *City of Sunrise v. D.C.A. Homes*, 421 So. 2d 1084, 1085 (Fla. 4th DCA 1982), *rev. denied*, 434 So. 2d 886 (Fla. 1983)).

While the Town is authorized to enact zoning ordinances to regulate the aesthetics and appearance of single-family dwellings, there are limitations on this authority, and zoning ordinances are subject to legal challenge. A direct facial challenge to the validity of an ordinance is generally made by an original proceeding for declaratory or injunctive relief. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003). A challenge to a zoning ordinance as applied to a particular applicant or property owner, on the other hand, may be raised on appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1983).

The first potential challenge to the Town's regulatory scheme for appearance review is that it is void for vagueness, thereby resulting in a denial of due process. The standard for testing vagueness is whether an ordinance "gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla. 4th DCA 2001), *rev. denied*, 821 So. 2d 305 (Fla. 2002). The language of a statute or ordinance "must provide a definitive warning of what conduct is required or prohibited, measured by common understanding and practice." *Id.* A property owner is entitled to be apprised of objective, discernible development standards as contained in a valid comprehensive plan and development ordinances. *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993). Consideration of vague or subjective criteria in zoning ordinances can violate an applicant's right to due process of law as guaranteed by the Fourteenth Amendment of the United State Constitution. *Effie, Inc. v. City of Ocala*, 438 So. 2d 506 (Fla. 5th DCA 1983), *rev. denied*, 444 So. 2d 416 (Fla. 1984). *See also North Bay Village v. Blackwell*, 88 So. 2d 524 (Fla. 1956) (zoning ordinance must prescribe definite standard applicable to all citizens similarly conditioned).

An ordinance may also be challenged as violating equal protection. A party asserting that a zoning ordinance has been applied in a manner that violates equal protection must show: (1) that they were treated differently from similarly situated individuals; and (2) that the approving body unequally applied a facially neutral ordinance for the purpose of discriminating against that party. *Burns v. Town of Palm Beach*, 343 F.Supp.3d 1258, 1272 (S.D. Fla. 2018). For a proposed development to be "similarly situated," it must be *prima facie identical* in all relevant respects. Additionally, development plans submitted during different time periods can render comparators not sufficiently similar. Consequently, in the zoning context, an equal protection claim is extremely difficult to prove.

While there is an argument that the Town's appearance review criteria are too subjective and fail to provide objective, discernible development standards, courts are very reluctant to strike down ordinances on these grounds. The only two reported federal court decisions addressing zoning ordinances with provisions somewhat similar to the Town's harmony

criteria both rejected challenges that the ordinances were unduly vague so as to deny the property owner due process or equal protection under the law.

In *Burns*, the plaintiff alleged that the Town of Palm Beach's zoning regulations were unconstitutionally vague because they granted the Town's Architectural Review Committee unbridled discretion. The court explained that when evaluating such claims, courts must determine whether a person of ordinary intelligence has a reasonable opportunity to know what is prohibited and whether the ordinance provides explicit standards to avoid arbitrary and discriminatory enforcement. *Id.* at 1270. The Town of Palm Beach's ordinance listed specific design elements that cannot be "excessively dissimilar to other structures within a 200-foot radius," including the "height of the building," "architectural compatibility," "arrangement of the components of the structure," and "design that is complimentary with the size and massing of adjacent properties." The court determined that these criteria were sufficiently clear for an ordinary person to understand what is prohibited and "provided parameters that constrain the Town's Architectural Review Commission's discretion, preventing arbitrary and discriminatory enforcement." *Id.* at 1271. The court further determined that the property owner failed to show that he was treated differently than others who were similarly situated. Consequently, the Town did not violate the property owner's equal protection rights when it denied approval of the proposed design for his residence as non-compliant with the Town's zoning ordinance that provided that the building should not be "excessively dissimilar" in relation to other structures within 200-foot radius. The proposed comparators (or approved homes) were not identical to his proposed design, were located in different neighborhoods, and were submitted during different time periods.

In upholding the District Court's decision, the Eleventh Circuit Court of Appeals determined that the Architectural Review Commission's discretion was limited by the ten criteria noted in the Town's zoning ordinance. *Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021). The court further explained that "the commission has limited membership made of no less than two, but no more than three, registered architects and one landscape architect, and even the other members had to be 'specially qualified' in art, architecture, community planning, land development, real estate, landscape architecture, or another relevant profession, or have 'civic interest and sound judgement' that could be used to determine the effects of a proposed building on 'the desirability, property values and development of surrounding areas.'" *Id.* at 1350. Finally, the court noted that the Town Council had the power to review any potentially arbitrary decisions by the Architectural Review Commission. *Id.*

Similarly, in *Rectory Park, L.C. v. City of Delray Beach*, 208 F.Supp.2d 1320 (S.D. Fla. 2002), the court upheld a zoning ordinance that provided that an application for a proposed project could be denied if it was "not compatible . . . with surrounding development" because it listed standards for determining the permissible density of a particular project. The court rejected a facial vagueness challenge to the City's conditional use ordinance that gave the city commission discretion to deny an application when a proposed project was "not compatible in terms of building mass and intensity of use with surrounding development." *Id.* at 1332. Recognizing that a decision maker is permitted discretion as to concepts as inherently subjective as "compatibility," the court

concluded that when a zoning regulation contains clear and definite standards, it will not be declared impermissibly vague just because the decision-maker has flexibility in applying the standards. *Id.* In other words, the fact that there is subjectivity and discretion accorded to decision-makers does not in and of itself render the criteria unconstitutionally vague.

Notwithstanding the foregoing, continuing with the Town's current harmony standards for single-family dwellings could still subject the Town to challenges to both the facial validity of the Town's Code and as-applied challenges based on vagueness and equal protection. While facial challenges are generally in the form of actions seeking declaratory relief (a court order that the ordinances are not valid) or injunctive relief (a court order preventing continued enforcement of the ordinances), a claim for damages is still possible. Additionally, property owners could allege, on appeal through a petition for writ of certiorari, both vagueness and equal protection challenges resulting from the application of the ordinances to their specific applications. Finally, as previously discussed with Council, a property owner could file Bert Harris claims against the Town, alleging that the application of the appearance review and harmony standards "inordinately burden" an existing use or vested right. The measure of damages under Bert J. Harris, Jr. Private Property Protections Act is compensation for the actual loss to the fair market value of the real property caused by the government action. Section 70.001, Fla. Stat. (2025).

Like the standards applied by the Town of Palm Beach and the City of Delray Beach, the Town's current harmony criteria are inherently subjective in nature. However, as explained in those decisions, mere subjectivity does not render a zoning ordinance invalid so long as there are sufficient criteria to guide the decision-maker. Consequently, if the Town Council chooses to continue to enforce the existing regulations, the Town Council should consider creating a formal Design or Appearance Review Board with persons experienced in the areas of architecture, planning, and/or real estate. These persons would have the requisite expertise in the field and would be more comfortable applying and enforcing the Town's standards.² Furthermore, if the Town were to continue enforcing its appearance review criteria, it should, like the Town of Palm Beach, include a provision allowing the Town Council to review these decisions. Finally, while Town Staff could continue to analyze the square footage and floor area ratio of structures within the comparison area when formulating its recommendations as to bulk, mass, and scale, it should avoid the adoption of strict formulas in applying the harmony criteria. Rather, in accordance with the case law cited above, its recommendations should be guided by the application of the actual words used in the Town's Zoning Code.

Should you have any questions, please do not hesitate to contact me.

² Shifting review from the Planning and Zoning Board to a Design or Appearance Review Board would merely represent a change in the decision-making body and would not present a more burdensome or restrictive change to either the harmony standards or the procedural requirements and therefore would not violate the Senate Bill 180 preemption.